In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 541

BENEDETTO CINQUEGRANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 546

ROSARIO MOGAVERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Apps. 1a-33a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1964. On August 24, 1964, Mr. Justice Goldberg extended the time for filing petitions for writs of certiorari to and including September 29, 1964. The petition in No. 541 was filed on September 26, 1964, and the petition in No. 546 was filed on September 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on reversing petitioners' convictions, the court of appeals should have granted judgments of acquittal rather than ordering a new trial.

2. Whether various rulings at the trial were proper.

STATEMENT

Petitioners and nine others were convicted * in the Southern District of New York under an indictment which charged a conspiracy between January 1950 and August 15, 1962 (the date of the filing of the indictment) to violate the narcotic laws. The evidence presented to the jury to establish the conspiracy is detailed in the opinion below (No. 541, Pet. App. 4a-8a). Briefly it revealed that in 1950 petitioner Rosario Mogavero, acting with his brother Joseph and one Locascio, hired Salvatore Rinaldo to import heroin; that subsequently Rinaldo made perio-

* The jury acquitted five other defendants.

dic deliveries of heroin to various wholesalers, including petitioner Cinquegrano; that in 1953 shortly before Rosario Mogavero was imprisoned under an eight-year State sentence he told Rinaldo to act as he had before and to take orders from his brother and Locascio as if the orders came from Rosario; and that thereafter this narcotic business continued its operations.

A number of defendants, including petitioners, raised at the trial and contended on appeal both that the conspiracy proved was not a single one and that they had not been shown to be members of the conspiracy during the applicable period of limitations. The court of appeals, while finding the proof sufficient to permit a finding of a single continuous conspiracy as to some defendants, held that the judge's instructions had not sufficiently focused for the jury the necessity, particularly in view of the limitations problem, of holding a particular defendant liable only for that part of the continuing conspiracy to which it could reasonably be inferred he agreed. Accordingly, it reversed the judgments of conviction and remanded the case for a new trial.

The court rejected both petitioners' contentions that the evidence established as a matter of law that they had withdrawn from the conspiracy before August 15, 1957, the date beyond which a prosecution would have been barred by the statute of limitations. As to Rosario Mogavero (No. 546), it found that evidence of his participation after his imprisonment "was strong enough for the jury to find that, far

from withdrawing, he continued to be a significant member of the conspiracy" (Pet. App. 24a).

The government's evidence as to Cinquegrano (No. 541), while showing a conspiracy into 1959, did not show a delivery to Cinquegrano after 1955. After the government rested, Cinquegrano asked the court to acquit him, submitting papers establishing that he had been imprisoned under a federal narcotics charge between May 1956 and March 1958. He did not offer this evidence to the jury and objected to any instructions presenting this issue of withdrawal for the jury's determination (Tr. 2784-2786, 2790-2791). The court of appeals held that Cinquegrano's incarceration for an unrelated narcotics offense did not in itself show his withdrawal from the conspiracy and entitle him to a judgment of acquittal under the statute of limitations. It ruled that "if on retrial Cinquegrano chooses to place the fact in evidence, this will raise a question for the jury on the issue of his withdrawal" (Pet. App. 25a).

ARGUMENT

1. There is no occasion for this Court to review the judgment of the court of appeals remanding the case for a new trial as to petitioners and refusing to direct a judgment of acquittal.

As to Mogavero (No. 546), the court of appeals was clearly justified in finding that the evidence introduced at the trial was sufficient to justify a jury finding that, while incarcerated, he remained in the conspiracy, supervising and financing it. The argument (No. 546, Pet. 10-18) that the government

failed to show that he knew of the illegal importation of the narcotics dealt with by his co-conspirators within the period not barred by limitations adds nothing of significance to his contention of withdrawal. The conspiracy which he formed and directed was to import as well as deal in the imported narcotics. The proof that he continued a member of that conspiracy, which operated as before to import and sell, would be sufficient to justify an inference that he knew that importation continued to be one of the objects of conspiracy.

As to Cinquegrano (No. 541) the court of appeals has made it clear that, on retrial, the issue of his withdrawal can be a question of fact for the jury. It has merely refused to hold that, as a matter of law, his imprisonment necessarily and conclusively established his withdrawal from the conspiracy. Petitioner argued that, since the government did not offer evidence to show that he continued in the conspiracy after his incarceration, he should have been acquitted as a matter of law. However, the government was not required to offer such evidence, because petitioner never put before the jury any evidence that he had in fact withdrawn from the conspiracy. Petitioner had the burden of going forward with evidence to prove his withdrawal. *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 573 (C.A. 2). Since the issue of withdrawal is for the jury, petitioner did not meet his burden of going forward by placing evidence of his imprisonment before the trial judge alone. Thus the refusal of the court of appeals to determine whether Cinquegrano was entitled to an acquittal on this ground was reasonable. It was a

proper exercise of its power to fashion relief upon the review of a criminal case. *Forman* v. *United States*, 361 U.S. 416.

2. The other arguments raised by Mogavero relative to the admissibility of the evidence, the instructions (No. 546, Pet. 22-26), and the use of tape recordings at a retrial (No. 546, Pet. 26-29) do not merit review at this interlocutory stage. The declarations of petitioner's brother were properly admitted as statements in furtherance of a conspiracy, since there was evidence of petitioner's own declaration that he was continuing in the conspiracy while in jail. Whether the defense, in cross-examining Rinaldo at the retrial, should be allowed to use the tape recording of his statements made to narcotic agents, as well as a transcript of the recordings, is a matter which the court below properly left to the trial court's discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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